DOLLAR CHANGE SERVICES PTE. LTD.

v.

THOMAS COOK TRAVEL SERVICES (S) PTE. LTD.

HIGH COURT, SINGAPORE
LAI SIU CHIU JC
[SUIT NO. 246 OF 1991]
4 NOVEMBER 1991

DAMAGES: *Breach of contract - Agreement terminated prematurely - Whether moneylending transaction and whether unenforceable - Section 2(c) of the Moneylenders Act Cap. 188.*

The plaintiff claimed for quantified damages for breach of a profit sharing or joint venture agreement to provide daily credit which was prematurely terminated by the defendants who contended that this was a moneylending transaction and was unenforceable by either party. The Deputy Registrar held that there was a triable issue and unconditional leave to defend was given. The plaintiffs appealed.

Held:

[1] The defendants being *bona fide* money changers were within the exception of s. 2(c) of the Moneylenders Act Cap. 188 as its primary object was not to lend money.

[2] The profit margin although fixed does not amount to interest as the profit is variable unlike interests which is on a fixed rate.

[3] The agreement is not untypical of commercial joint ventures with one party providing the expertise and the other the funds.

[Appeal allowed. Interlocutory judgment entered. Damages to be assessed]

Cases referred to:

*Moorcock [1889] 14 PD 64 (**cit**)*
*Newton v. Pyke [1908] 25 TLR 127 (**cit**)*
*Private Investment Company for Asia SA v. Lorraine Esme Osman [1989] 3 MLJ 29 (**cit**)*
*Yeep Mooi v. Chu Chin Chua [1981] 1 MLJ 14 (**cit**)*
*Official Assignee v. Ek Liong Hin Ltd. [1960] 26 MLJ 85 (**cit**)*
*Shamsudin v. Vigayacone [1971] 1 MLJ 7 (**cit**)*
*Mahmoud v. Ispahani [1921] 2 KB 17 (**cit**)*
*Promer Ltd. v. Shaw Brothers [1964] 2 All ER 584 (**cit**)*
*Re A R Mackey Ltd. Farmers Finance Ltd. v. Craig & Anor. [1971] NZLR 289 (**cit**)*
*Lii Tat Credit & Mortgage Sdn. Bhd. v. Tang Liing Kang [1988] 3 MLJ 104 (**cit**)*
*Litchfield v. Dreyfus [1906] 1 KB 584 (**cit**)*

Legislation referred to:

Moneylenders Act 1900 [UK], ss. 2, 3, 6
Supreme Court of Judicature Act [Sing], s. 34
Moneylenders Act (Cap 188) [Sing], s. 2(c)

For the defendant - Johnny Cheo
For the plaintiff - Tan Bok Hoay

JUDGMENT

Lai Siu Chiu JC:

This matter came before me by way of an appeal against the learned Deputy Registrar's decision granting the defendants unconditional leave to defend the plaintiffs' claim with costs in the cause. The plaintiffs appealed therefrom and when I heard the appeal on 1 October 1981, I reversed the learned Deputy Registrar's decision and allowed the plaintiffs' appeal with certain consequential orders. Counsel for the defendants then requested that I hear further arguments under s. 34 of the Supreme Court of Judicature Act (Cap 322) which request I granted. After hearing further arguments from the parties, I have decided to affirm the order which I made on 1 October 1991, namely, to reverse the Deputy Registrar's decision and allow the plaintiffs' appeal, award them interlocutory judgment with damages if any to be assessed by the Registrar, with costs in the cause. I now give my reasons.

The plaintiffs' claim as set out in their statement of claim filed on 4 February 1991 is for damages quantified at $1,620,000 for the defendants' alleged breach of an agreement contained in a letter dated 6 January 1990 (the agreement) from the defendants to the plaintiffs which agreement is shown as Exh. 'NLC2' in the first affidavit of N L Cunnew (Cunnew) filed on 12 March 1991.

The salient terms of the agreement are:

(i) The defendants would extend to the plaintiffs a daily trading line of up to $1 million, to be made available from 10.00 a.m daily.

(ii) The plaintiffs would repay the facility extended by 3.30 p.m daily alternatively by depositing with the defendants the equivalent sum in foreign currencies.

(iii) The profits arising from the transaction would be shared 75% and 25% in favour of the plaintiffs and the defendants respectively.

(iv) The duration would be for 2 years ending on 31 December 1991 after which the agreement was renewable yearly with 2 months prior written notice.

The agreement also covers forward contracts in foreign currencies which aspect does not concern this dispute.

The defendants by a letter (the notice of termination) dated 15 June 1990 to the plaintiffs (Exh. 'NLC3' in the first affidavit of N L Cunnew) terminated the agreement with immediate effect. By then the plaintiffs had used the defendants' facility for approximately 1½ months from about mid-April to end of May 1990.

The plaintiffs through their solicitors refused to accept the notice and ultimately commenced these proceedings claiming the aforesaid $1,620,000 as loss of profits for 18 months (15 June 1990 to 31 December 1991) based on $120,000 per month or $6,000 per day for a 20 day trading month less the defendants' share of 25% of the profits.

Three (3) affidavits were filed by the defendants, all sworn by N L Cunnew, who is a director of the defendants' parent company, to resist the plaintiffs application for summary judgment. In essence the defendants contended:

(a) They carry on the business of travel and tour agents and also dealt in foreign exchange activities such as travellers' cheques and money-changing, exhibiting in support thereof a copy of their objects filed with the Registry of Companies;

(b) Both the plaintiffs and the defendants are only licensed as money changers, under the provisions of the Money Changing and Remittance Businesses Act (Cap. 187).

(c) The parties had in the past co-operated in the purchase and sale of foreign currencies and in the encasement of travellers' cheques.

(d) The defendants did not/do not have a moneylender's licence.

(e) The agreement requires the defendants to extend a daily trading line of $1 million to the plaintiffs which activity is separate and distinct from the ordinary course of business conducted by the defendants with the plaintiffs and which if it continued established a system with a sufficient degree of continuity as to amount to moneylending.

(f) The transactions envisaged under the agreement are a complete departure by the defendants from their past business practice.

(g) The transactions under the agreement contravene the provisions of the Moneylenders' Act Cap 188 (the Act) and as the defendants did not/do not possess a moneylender's licence, the contract is void, illegal and unenforceable by either party.

(h) The sum claimed of $1,620,000 as well as the interest charge of 15% per annum are unsubstantiated in addition to which the plaintiffs have failed to mitigate their loss by obtaining alternative financing for the period concerned.

Notwithstanding the stand taken in their notice of termination, the defendants by a letter dated 10 July 1990 to the plaintiffs (shown as part of Exh. 'DC3' in the second affidavit of the plaintiffs' managing director Chong Chuan Pang filed on 28 March 1991) agreed to continue to extend the daily trading line of $1 million on condition that:

(a) the plaintiffs deposit negotiable security/collateral with the defendants amounting to 110% of the value of the facility extended; and

(b) the plaintiffs do not enter into foreign exchange transactions that amounted to tax evasion, illegal activities or contravened exchange control regulations.

The plaintiffs by 3 affidavits sworn by their said managing director (who is known to the defendants as Donald Chong) rebutted the defendants' arguments alleging that:

(a) Well before the agreement, the parties, since commencement of their relationship in 1986, had been engaged in 'profit sharing margin joint business ventures' on an *ad hoc* basis.

(b) The agreement constituted a joint venture between the parties, not a moneylending arrangement.

(c) The plaintiffs used the defendants' facility to buy and sell foreign currencies at varying profit margins.

(d) If at the end of each trading day at 3.30 p.m there was no profit out of the transaction, then neither party would receive any profits but the defendants would be reimbursed their initial capital outlay.

(e) Because there was virtually no question of loss in the arrangement, it was not necessary to make express provision in the agreement for loss sharing between the parties although by necessary implication the plaintiffs and the defendants would similarly bear losses in the ratio 75% to 25% respectively.

In Chong's second affidavit filed on 28 March 1990 he also alleged (which Cunnew denied) that the agreement was actually executed in April 1990 but backdated to 6 January 1990 by the defendants' then director and general manager Helen Goh because the plaintiffs had provided valuable consideration to the defendants for the agreement, namely, the plaintiffs had paid a sum of $525,225 for the loss which the defendants sustained in a Malaysian ringgit transaction with one Sukhdev Singh, a despatch contractor formerly used by the plaintiffs. In support of this allegation, the plaintiffs exhibited a facsimile letter which the defendants despatched to the plaintiffs' then solicitors Messrs. Koh & Yang which letter although undated bore as the date and time of transmission respectively 16 April 1990 Monday 13:20 hours. The draft agreement attached therewith was dated 30 December 1989. This allegation was further supported by an acknowledgment of receipt from the defendants to the plaintiffs dated 17 April 1990 in the sum of $525,225 (Exh. 'DC2' in the second affidavit of Chong) which is a day after the draft agreement was allegedly transmitted to the plaintiffs through their solicitors.

In support of Chong's contention that the alleged joint venture between the plaintiffs and the defendants is a regular practice amongst money changers, the plaintiffs filed 2 affidavits affirmed by 2 money changers, namely Chow Chiaw Boon and Ko Say Gak.

Chong also alleged, which was denied by Cunnew, that the defendants approached the plaintiffs to buy over the plaintiffs' operations.

Notwithstanding the notice of termination, the plaintiffs continued to have dealings with the defendants mostly on Thomas Cook travellers' cheques. At some point in time Helen Goh and Patrick Ong (the defendants' then general manager of foreign exchange), who were both signatories to the agreement, left the defendants' services. No affidavit was sworn by either of them to rebut or to affirm the plaintiffs' allegations.

Before the learned Deputy Registrar, Counsel for the defendants disputing both liability and quantum raised as the only triable issue the point that the agreement is void at its inception as the defendants would thereby be engaged in unlicensed moneylending. A secondary point was raised that the possibility of losses not being covered by the agreement, in order to ascertain the intention of the parties, the dispute must go to trial. The defendants very sensibly did not pursue the contentions set out in Cunnew's second affidavit (para. 12) that Helen Goh and Patrick Ong had no authority to enter into the agreement without prior consultation or approval of the defendants' London office.

Dealing with the secondary point first, I am of the view that the officious bystander test as propounded by Bowen LJ in *The Moorcock* [1889] 14 PD 64 should be applied and losses, if any, sustained by the plaintiffs in transactions arising out of the $1 million facility extended by the defendants would also be borne by the parties in the ratio 75% to 25% in favour of the plaintiffs and the defendants respectively, on the basis that both parties would as reasonable men, have agreed to it had the point been raised to them.

Numerous authorities were cited by both Counsel in support of the parties' respective stands and I shall now deal with some of them.

It would be useful to start with the test of a moneylender as propounded by Walton J in *Newton v. Pyke* [1908] 25 TLR 127 *viz,* whether a person is carrying on business as a moneylender is in each case a question of fact. It is not enough to bring a person within the purview of the Moneylenders Act 1900 to show that he has on several occasions lent money at remunerative rates of interest; to bring him within the Act a certain degree of system and continuity about his transactions must be shown.

Section 6(d) of the Moneylenders Act 1900 of England is in *pari materia* with the definition of 'moneylender' and the exception in subsection (c) under s. 2 of the Act.

Counsel for the plaintiffs relied on *Private Investment Company for Asia (Pica) SA v. Lorraine Esme Osman* [1989] 3 MLJ 29, *Yeep Mooi v. Chu Chin Chua* [1981] 1 MLJ 14 and the privy council's decision in *The Official Assignee v. Ek Liong Hin Ltd.* [1960] 26 MLJ 85 to support his contention that the agreement was a joint venture between the parties and the transactions thereunder did not amount to moneylending. Counsel pointed out that the defendants' object No. 29 (Exh. 'NLC1' of Cunnew's first affidavit filed on 12 March 1991) in any event allowed the defendants 'to lend money and advance money or give credit to any person or company' whilst object No. 22 empowered the defendants to '... enter into partnership or into any arrangement for sharing of profits ... joint venture ... or otherwise, with any person or company ... engaged in any business or transaction ... '. He contended that the defendants came within the exception under s. 2(c) of the Act, *viz.* a person '*bona fide* carrying on any business not having for its primary object the lending of money in the course of which and for the purposes whereof he lends money'. The Privy Council in *The Official Assignee v. Ek Liong Hin Ltd.* had held that the word 'whereof' in s. 2(c) refers to the 'business' and not to 'the primary objects' in that subsection. Like the defendants here, the respondent in that case Ek Liong Hin Ltd., admitted it carried on moneylending but it denied that it was in fact a moneylender in making loans to its customers on the security of goods stored in its warehouses. As with the defendants, Ek Liong Hin Ltd. had no separate moneylending business, being primarily rubber merchants and shippers. The Privy Council held that as the respondent had undertaken the moneylending transactions in the course of and for the purposes of its business, the respondent was not a 'moneylender' within the definition of the then Moneylenders' Ordinance.

As the decision in *Pica v. Lorraine Esme Osman* is under appeal, I will not refer to it. I would however refer to the Federal Court's decision in *Yeep Mooi's* case and in particular to Salleh Abbas FJ's judgment (at p. 15) where he said:

> We have on another occasion observed that the Moneylenders Ordinance 1951 does not strike at moneylending but at moneylenders and at the loans lent by them. The Ordinance is never intended to apply to an individual, or any member of the public who lends money even at interest, unless he does so as a business.

In response to his opponent's arguments, Counsel for the defendants cited *Shamsudin v. Vigayacone* [1971] 1 MLJ 7, *Mahmoud v. Ispahani* [1921] 2 KB 17 in support of his contention that where the contract is illegal, a claimant will be denied any relief by a Court of law. I do not place any reliance on *Mahmoud's* case for the reason that the decision of the Court of Appeal was based on a finding that the defendant did not have a licence to buy linseed oil from the plaintiff, as required under the defence of the Realm Regulations and as the contract of sale was prohibited thereunder and therefore illegal, no claim could be made under the contract. Again in *Shamsudin v. Vijayacone* the Court came to a finding on the evidence that there was a sufficient degree of system and continuity in the defendants' moneylending transactions so as to give rise to the presumption that he was a moneylender under s. 3 of the Act which onus he failed to discharge. Neither case is particularly helpful since on the facts as adduced from the affidavits filed by both parties, I have to make a determination whether the defendants have indeed raised a triable issue and the probable defence of moneylending.

The undisputed facts culled from the affidavits filed by both parties are as follows:

(a) The defendants lent (to use the defendants' own words) $1 million daily to the plaintiffs which was refundable by 3.30 p.m of the same day.

(b) The profits arising from the plaintiffs' use of the defendants' facility were apportioned 75% to 25% in favour of the plaintiffs and the defendants. For the short duration that the agreement operated no losses were sustained by the plaintiffs.

(c) That limb of the agreement relating to forward contracts in foreign currencies was never utilised by the plaintiffs before the agreement was terminated.

(d) Helen Goh and Patrick Ong had profit quotas to maintain for the defendants.

(e) The defendants terminated the agreement as 'it falls outside of the parameters under which Thomas Cook as a group are prepared to undertake foreign exchange business' (extracted from the notice of termination).

(f) Both parties are licensed money changers, commenced their business relationship in 1986 and despite the notice of termination and this suit, continue to have dealings mostly on Thomas Cook travellers' cheques.

(g) About a month after the notice of termination was served on the plaintiffs the defendants offered to renew the daily trading line of $1 million to the plaintiffs on new terms.

(h) There is a practice amongst money changers in Singapore to participate in joint ventures similar to that set out in the agreement, on an agreed profit sharing or commission basis.

(i) The 2 persons Helen Goh and Patrick Ong initiated the agreement with the plaintiffs' Donald Chong, and Cunnew succeeded Helen Goh sometime in May 1990.

In the further arguments canvassed before me, Counsel for the defendants cited other authorities in support of the defendants' contention that they were engaged in unlicensed and therefore illegal moneylending consequent on the agreement. He relied on *Premor Ltd. v. Shaw Brothers* [1964] 2 All ER 584 to reinforce his arguments that the plaintiffs had not brought themselves within the exception under s. 2(c) of the Act. The relevant headnotes of this case read:

> The plaintiff finance company's principal business was that of financing hire purchase transactions. It also habitually lent money to dealers whose cars it purchased and let out on hire. For these loans it charged a high rate of interest. It was conceded that this lending part of its business was that of moneylending, that the finance company would accordingly be a 'moneylender' within s. 6 of the Moneylenders Act 1900 and the loans would not be recoverable, unless the finance company showed that it was within exception (d) to that section.
>
> The finance company sought to recover from the defendant motor car dealers sums of £300 and £200 lent with interest at some sixty per cent per annum, on fictitious documents purporting to show that each sum was paid on a sale of a specified motor vehicle.
>
> **Held:** although the business of hire-purchase finance was a 'business not having for its primary object the lending of money within the Moneylenders Act 1900, s. 6(d) yet the two loans were neither made in the course of that principal business of the finance company nor made for the purposes of its principal business, but were simply loans to a customer for the purpose of obtaining a high rate of interest; accordingly, in relation to this moneylending part of its business, the finance company had not brought itself within exception (d) to s. 6 and the loans were not recoverable.

The Court of Appeal dismissed the finance company's appeal because the 2 loans formed part of 57 alleged 'stocking transactions' between the company and defendants all of which involved loans by the former to the latter of which only 28 were secured by motor cars. All 57 loans carried interest exceeding 60% per annum.

The second case cited by Counsel was *Re A R Mackey Ltd.* (*In liquidation*), *Farmers Finance Ltd. v. Craig & Anor.* [1971] NZLR 289. The facts here were, a debenture was executed in favour of the appellants Farmers Finance Ltd., by A R Mackay Ltd. (Mackay), to secure the sum of $2,000 and 'further advances'. Upon the liquidation of Mackay, the appellants claimed it was owed a total sum of $129,568 under the debenture. The appellants had been incorporated for the primary purpose of handling the 'financing arrangements' of Mackay which had been incorporated six months earlier and which carried on the business of a dealer in new and second hand cars, trucks and tractors. The dealings between the appellants and Mackay took two forms - the discounting of hire purchase agreements wherein the advances made by the appellants were secured by assigning to the appellants by way of mortgage hire purchase agreements. The other form was known as 'D plan financing' whereby the appellants advanced to Mackay the purchase price of each particular car purchased by Mackay. Each advance was repayable at the end of thirty days and carried interest at 8 per cent per annum and Mackay by way of intended security executed a conditional hire purchase agreement in respect of each vehicle wherein the appellants were shown as the owner and Mackay as the purchaser. Under the new 'D plan financing', it was agreed that Mackay was not required to repay the advance until it sold the car in question and to secure the advance Mackay sold the car to the appellants who resold it back to Mackay.

The appellants were not registered as a moneylender under the New Zealand Moneylenders Act 1908 and there was no evidence that the appellants advertised or announced or held itself out in any way as carrying on the business of moneylenders. On appeal, the Court affirming the decision of the trial Judge held that both systems of 'D plan financing' resulted in a series of loans, that the appellants had not confined their lendings to providing 'a recognised mercantile service' to Mackay as they had loaned money to other companies and were accordingly a moneylender. As the appellants were not registered as a moneylender, the debenture was void and the advances irrecoverable as unsecured debts.

Counsel for the defendants also referred to the case of *Lii Tat Credit & Mortgage Sdn. Bhd. v. Tang Liing Kang* [1988] 3 MLJ 104 to answer his opponents' contentions that the defendants were empowered by their objects to enter into the agreement and the transactions thereunder. The plaintiffs in this case had an object clause similar to object No. 29 of the defendants and all that the Court said (at p. 106) was:

> As regards the object clause, this is to determine the purposes of the creation of the company and to define its capacity. It identifies the scope within which the company's activities are to be confined. It is common practice that a company has numerous objects included in the object clause of its memorandum of association. For example, in the instant case, the plaintiff company has some 40 objects. But not all the stated objects may be carried out. Whether or not a company is engaged in activities within a specified object contained in its memorandum of association and, if so, the frequencies and extent of such activities are questions of fact to be established by evidence.

The case is singularly unhelpful on the issue to be determined. As for the other 2 cases cited, it seems clear on the facts peculiar to *Premor Ltd. v. Shaw Brothers* and *Re A R Mackay Ltd.* that the Courts were justified in their findings that the plaintiffs/appellants were moneylenders because the evidence established a sufficient degree of continuity and system in their moneylending transactions.

The facts in this case do not warrant the making of the presumption against the defendants under s. 3 of the Act. Rather, I am of the view that they come within the exception under s. 2(c) of the Act. The defendants *bona fide* are money changers and dealers in foreign exchange which business does not have for its primary object the lending of money. In the

course of and incidental to such business the defendants extend a daily facility to the plaintiffs to both parties' mutual benefit. The plaintiffs because of their said managing director's contacts used the defendants' facility to buy and sell foreign currencies at profit margins which varied, which activity is precisely what money changers do. The defendants because of their high credit rating with their bankers, provided the financing. The arrangement is not untypical of commercial joint ventures, one party providing the expertise and the other the funding. One definition of a joint venture is that set out in Young and Bradford's 'Joint Ventures: Planning and Action' and which is:

> An enterprise corporation or partnership formed by two or more companies, individuals or organizations at least one of which is an operating entity which wishes to broaden its activities for the purpose of conducting a new profit motivated business of permanent duration. In general the ownership is shared by the participants with more or less equal distribution and without absolute dominance by one party.

By agreement, the parties decided that the plaintiffs due to their expertise would retain ¾ of the profits arising out of the joint venture and the defendants would have the remaining ¼. In this regard I reject the arguments of Counsel for the defendants that the 25% profit element amounts to payment of interest to the defendants. The major flaw in his argument is that interest in moneylending transactions bear a fixed rate. Here the amount of profit varied although the ratio *viz.*, 25% of such profits to the defendants was maintained.

Counsel for the defendants, adopting Lord Denning MR's words (at p. 587) in *Premor Ltd. v. Shaw Brothers* argued that the defendants failed to satisfy the requirement to bring themselves within the exception under s. 2(c) of the Act, *viz.*, that the facility was to keep the customer (the plaintiffs) 'sweet', that is, keep him well disposed towards the lender (the defendants), since the plaintiffs continue to have business dealings with the defendants. My short answer to this point is that Chong in his second affidavit filed on 28 March 1991 has clarified that the continued business dealings between the parties concern mostly Thomas Cook travellers' cheques which issuing party is the defendants' ultimate parent company - in other words the plaintiffs' continued dealings with the defendants are more by circumstance than by choic money changers accept foreign currencies either in cash or in the form of travellers' cheques.

Relying on *Re A R Mackay Ltd.*, Counsel for the defendants also argued that the fact that the defendants lent to a 'single borrower' rather than to 'all and sundry' as propounded by Farwell J in *Litchfield v. Dreyfus* [1906] 1 KB 584 does not make the defendants any less a moneylender if they are one. But what Richmond J actually said (at p. 300) was:

> I think that if the evidence proves that a lender has made the lending of money his business then he cannot escape from the statutory definition of 'moneylender' by showing that all his loans were made to the same borrower.

As I am of the view that the defendants are not engaged in the business of moneylending, I do not find Richmond J's *dicta* particularly helpful.

I should also mention that it is not material to my decision what was the actual date that the parties executed the agreement and whether the agreement was or was not backdated to January 1990 from April 1990. I cannot however ignore the fact that barely a month after the notice of termination, the defendants offered to revive the facility previously given to the plaintiffs, on condition it was fully secured to the extent of 110% of the value extended. In the light of this subsequent letter, the defendants' excuse as stated in the notice of termination that the agreement fell outside the normal operating parameters of their business

seems to have a hollow ring. What the defendants desired it seems to me is to have a 'no loss' situation so that in the event the joint venture with the plaintiffs does sustain losses, the plaintiffs will have to bear the entire loss and the defendants will take recourse against whatever security or collateral provided by the plaintiffs.

The purpose of O. 14 proceedings is not to shut out a defendant who shows he has a fair case for defence, or reasonable grounds for setting up a defence or even a fair probability that he has a *bona fide* defence; but where as here, there is no real substantial dispute as to the facts or law, the plaintiffs should not have to be put to the time, trouble and expense of a trial to obtain redress on their claim. The parties here had an agreement which the defendants unilaterally and prematurely terminated. The only issue which is a question of law is whether the operation of the agreement would result in the defendants being unlicensed moneylenders; I answer that question in the negative.

On the question of quantum however, I accept the arguments of Counsel for the defendants that even if the defendants are liable for breach of contract, the plaintiffs must still prove that they have suffered damages in the sum claimed of $1,630,000 and also justify the claim for interest at 15% per annum.

Accordingly the plaintiffs' appeal is allowed, they shall have interlocutory judgment with damages to be assessed by the Registrar and the costs of this appeal should be reserved and abide the outcome of the assessment for damages.

Also found at [1992] 1 CLJ 731